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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/843,381	04/25/2001	David Robert Dudek	TS9243 (US)	8871

7590 02/11/2005

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EXAMINER

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ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 02/11/2005

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Application Number: 09/843,381

Filing Date: April 25, 2001

Appellant(s): DUDEK ET AL.

D. Brit Nelson

For Appellants

EXAMINER'S ANSWER

This is in response to the appeal brief filed 11/26/04.

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(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The Appellants' statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The Appellants' statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellants' brief includes a statement that claims 1-18 not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

The following is a list of grouping that Appellant' s have wrongly set forth and must be disregarded by the Board.

Regarding the judicially created double patenting rejection, the separate grouping of claims 3; 4-5,8-10; 11-13, (items VII A. 2-4) is deemed irrelevant because Appellants cannot disclaim a portion of a patent and the entire patent thus rises and falls with the double patenting determination of the broadest claim 1.

Regarding the rejection of Claims 1-10 under 35 USC §103(a) based on Seo in view of Partyka et al., the grouping of claims 1,3,6 together is improper because base claims 1 and 6 are covered in combination with the dependent claims which depend therefrom. Thus item (VII C 1) should read only claims 1,3.

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

6598631	Hewlitt et al.	7/29/03
6651880	Hewlitt et al.	9/3/03
6062277	Seo	5/16/00
5941363	Partyka et al	8/24/99
6584309	Whigham	6/24/03

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-18 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 66598631 and 6615880 in view of Seo

Claims 1,2,3 6,8, 14, 16 are rejected under 35 U.S.C. 102(e) as being anticipated by Seo.

Claims 1-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Seo in view of Partyka et al.

Claims 6, 7,8, 11, 12, 13-18, are rejected under 35 U.S.C. 103(a) as being unpatentable over Seo in view of Whigham.

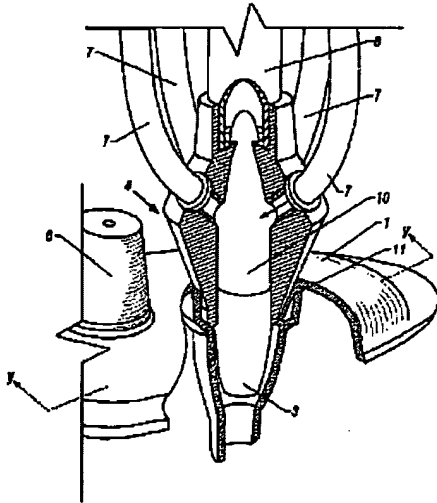
These rejections are set forth in a prior Final Office Action, mailed on 4/21/2004.

(11) Response to Argument

DOUBLE PATENTING

The claims of the present application are unpatentable over commonly assigned Hewlitt et al. US 6598631 and US 6651880 under the judicially created doctrine of double patenting. Appellants have failed to provide any terminal disclaimer to avoid this rejection, and instead choose to appeal the rejection. Since present application is later filed of the two Hewlitt et al. patents at issue, a one way determination is to be used. The Examiner submits that claim 1 of each of the Hewlitt et al. patents provides the structure fully capable of carrying out the invention at hand, when taken with the teachings of Seo, US 6062277. All that needs to be evidenced by the examiner under this doctrine is that Hewlitt et al. when taken with Seo, are mere obvious variants of the present invention. (Under the one-way test, if the scope of the application and the patent claims is not identical, the court must ask whether the former defines merely an obvious variation of the latter. See, Goodman, 11 F.3d at 1052, 29 USPQ2d at 2015-16.)

Claim 1 of US ' 631 discloses structure as follows:



6598631

1. A device for mixing of one or more concentrates and/or diluents at an interface between a container and a filling head of a vending machine as the container is filled using said filling head, comprising the combination of: (i) a filling head component 4, comprising one or more concentrate and/or diluent inlet tubes 7/8, said inlet tubes being in fluid communication with a central chamber 9, said chamber comprising therein a diverter 10, said diverter being such that the difference between the diameter of the diverter and that of the surrounding chamber is such that the cross-sectional area therebetween gradually increases in the direction of flow of the filling head component; and (ii) a component located in a fill aperture of a container,

said components being engageable with one another so as to provide a direct path from said filling head to the interior of the container.

US' 631 uses this structure for the purpose of " mixing concentrate and diluent together...[so that]... any number of concentrates may be envisioned" . Further, claim 1 calls for the environment of a vending machine. Soe discloses a controller which includes a

... product selecting unit 410 disposed with a plurality of buttons corresponding to respective products in the automatic vending machine serves to input a product selection signal to the controller 420 when the buttons are manipulated.

The inference taken from Soe is component customization which takes plural raw materials, e.g., coffee concentrate, hot water, cold water, sugar, and /or cream, and through the selection process of the user, customizes a mixture according to the person' s desired tastes. Thus, claim 1 of the instant application recites and is met by US ' 631 and Soe as follows:

(a) preparing said customisable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer (US ' 631 inlets 7,8),

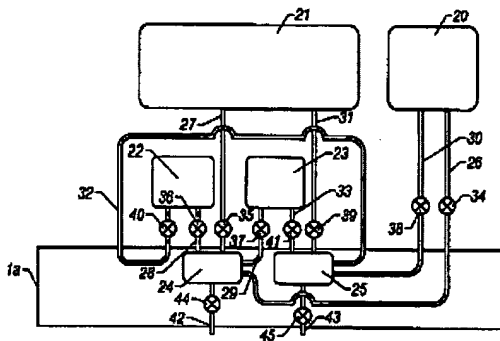
(b) optionally reconstituting said components with one or more other components (Soe' s controller is an obvious variant allowing optional reconstituting of the consumer product, coffee syrup, hot water, cold water, cream, sugar)

and

(c) dispensing from a vending system at a point-of-sale of said consumer products (US ' 631 dispenses from head 4).

It is therefore clear, claim 1 of the present application is a mere obvious variant of claim 1 of US ' 631. Appellants' attempt to continue arguments individually directed to claims of groups 3; 4-5; and 8-10 is deemed irrelevant because Appellants cannot disclaim a portion of a patent, and the entire patent thus rises and falls with the double patenting determination of the broadest claim 1. *See*, 35 U.S.C. §253 (stating that any patentee or applicant can " disclaim or dedicate to the public the entire term, or any terminal part of the term, of any *patent* granted or to be granted.").

Regarding US' 880, the same holds true. Claim 1 of US ' 631 discloses structure as follows:



6615880

1. A system for the mixing of one or more concentrates to form a product, comprising a vending machine, said vending machine comprising one or more diluent sources 20 and one or more concentrate sources 21,22,23, said diluent and concentrate sources being in fluid communication with one or more mixing chambers 24,25, the mixing chamber being adapted to mix the diluent and concentrate sources prior to dispense, the product being selected from cleaning products and detergents, the vending machine further comprising one or more dispense points 42,43 adapted to dispense the product into a storage container when the storage container is positioned for dispensing from the vending machine.

The inference taken from Soe is component customization which takes plural raw materials, e.g., coffee concentrate, hot water, cold water, sugar, and /or cream, and through the selection process of the user, customizes a mixture according to the person' s desired tastes. Thus, claim 1 of the instant application recites and is met by US ' 631 and Soe as follows:

A process for the customisation of consumer products, which comprises the steps of:

(a) preparing said customisable consumer products (concentrates 21-23 and diluents) according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer,

(b) optionally reconstituting said components with one or more other components (Soe' s controller is an obvious variant allowing optional reconstituting of the consumer product, coffee syrup, hot water, cold water, cream, sugar),

and

(c) dispensing from a vending system at a point-of-sale of said consumer products (US ' 880 dispenses at elements 42,43).

It is therefore clear, claim 1 of the present application is a mere obvious variant of claim 1 of US ' 880. Appellants' attempt to continue arguments individually directed to claims of groups 3; 4-5; and 8-10 is deemed irrelevant because Appellants cannot disclaim a portion of a patent, and thus the entire patent rises and falls with the double patenting determination of the broadest claim 1; *see*, 35 U.S.C. §253 (stating that any patentee or applicant can " disclaim or dedicate to the public the entire term, or any terminal part of the term, of any *patent* granted or to be granted.").

Accordingly, the double patenting rejection must be upheld.

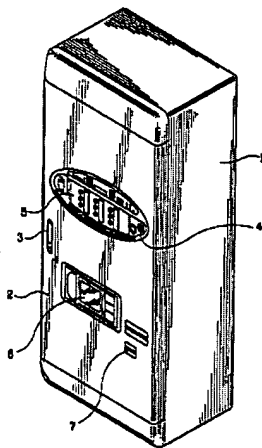
ANTICIPATION UNDER §102e

Claims 1, 2, 6-7, 14-18 §102e are Anticipated under §102e rejection Over Seo.

Appellants erroneously maintain that the §102e rejection of claims 1, 2, 6-7, 14-18 is misplaced because “ the Examiner appears to be comparing the product selectable in Seo to the component of the product selectable in the present invention” (App. Brief p. 9). This is wrong.

The disclosure in Seo clearly sets forth that at least hot or cold water is dispensed depending on what selection is made (see col. 3 lines 13-15, a hot/cold water nozzle 320 for extracting hot or cold water stored in the hot water can 316 or cold water can 318...” , and that

FIG.1(PRIOR ART)



” [t]he product selecting unit 410 disposed with a plurality of buttons corresponding to respective products in the automatic vending machine serves to input a product selection signal to the controller 420 when the buttons are manipulated” . (See, col. 3, lines 58-61)

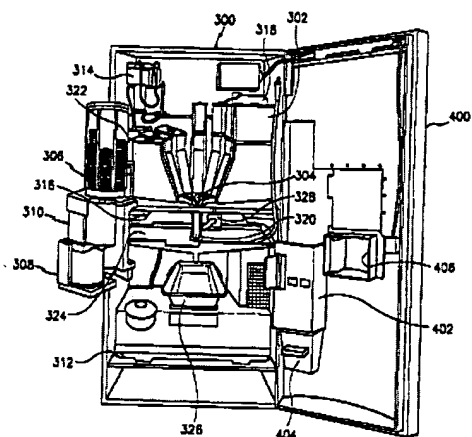
The disclosure of product selection occurring after “ buttons are manipulated” inherently means that pressing a single button will not result in final product selection. The disclosure maintains plural buttons are manipulated to effect a selection. It is therefore wrong for Appellants to contend that the selection process in Seo is accomplished by single step, e.g., of one product dispensing. In fact, all products, i.e., customized coffees are created and reconstituted with each order. See, Seo, col. 4:

Meanwhile, the cup supplier 440 accommodates the cup supplied from the cup loading bin 306 into the cup holder member 502 and moves the cup holder member 502 holding the cup toward the raw material extraction unit 304 to allow the raw material to be inserted thereinto. The cup filled with the raw material is then accommodated into the cup housing 308.

It is inherent that a hot or cold water button selection be required as part of the coffee selection, otherwise there would not be disclosed manipulation of plural buttons.

Furthermore, Appellants would have the Board believe that somewhere in claim 2 is language requiring the user to reconstitute the components by using a separate selection for each component desired, rather than a single command (product selection) which then automatically reconstitutes the components to form the desired product. There can be no doubt that the coffee product issued from the device in Seo is the product of customizing selective different components to create a given cup of coffee, regardless of how it comes about. Seo is clear about this as follows:

FIG. 3



The body 300 is provided therein with a raw material can 302, a raw material extraction unit 304, a cup loading bin 306, a cup dispenser 310 for transferring a cup supplied from the cup loading bin 306 to the raw material extraction unit 304 to receive raw materials and to thereafter accommodate the cup in a cup housing 308, a water can 312, a purified water can 314 for purifying the water supplied from the water can 312 to thereafter store same, a hot water can 316, a cold water can 318, a hot/cold water nozzle 320 for extracting hot water or cold water stored in the hot water can 316 or cold water can 318, a stirrer box 322 for storing a plurality of stirrers and later extracting same during sale of products, a raw material pad 324 for containing raw material dregs, a drainage pad 326 for collecting the hot/cold water extracted from the hot/cold water nozzle 320 and a ventilator 328 for ventilating internal air and external air. (Seo, col. 3)

The raw material discussed in Seo is clearly set forth as being segregated as separate components.

First of all, when a user selects a kind of coffee by inserting a coin and manipulating the product selection unit 5, a cup is accommodated into the cup housing slot 6. Raw materials such as coffee, cream, sugar and like are supplied to the mixing unit 13 via the raw material chute 11 and hot water is supplied thereinto. The mixing unit mixes the raw materials

and hot water and supplies same into a cup accommodated in the cup housing slot 6 via a nozzle, and the user can purchase a desired coffee.

Thus, Appellants' product-based attack on the Seo disclosure cannot be sustained because components of the product in Seo are selectively used/reconstituted even if as Appellants admit, the " vending machine...does the rest by supplying programmed ingredients for the product" (Appl. Brief p. 9).

That is, assuming arguendo that Seo can be read as teaching only product selection, this argument is still irrelevant and has no weight because even selecting a product in Seo, e.g. hot coffee with sugar, still results in the recited claim language being met, namely, " optionally reconstituting said components with one or more other components" . More specifically, if a user were to select a button marked " coffee black and sugar" this would constitute an " optional" step, namely, choosing or selecting between buttons controlling the dispensing of " hot coffee black" or " not coffee black + sugar" or " cold coffee + cream" or " cold coffee black" , etc. Regardless of what button is pushed, the result of this action is exactly what has been recited in claim 1, some components, hot water versus cold water, over others, are reconstituted with some others, coffee, no cream, versus coffee and cream. Therefore, Appellants' position addressing the alleged insufficiency under §102 of claims 1,2,6,7,14-18 is clearly wrong and cannot be maintained.

Claim 2 Is Unpatentable Under 35USC §102(e)

Claim 2 recites a “ simultaneous multiple customization” step. As set forth in the Office Action, the Examiner reads this very broad language as defining successive process steps (adding water to mixture stirring etc.) which answers the limitation of simultaneous multiple customization” .

Claim 8 and 35 USC §102(e)

The Examiner withdraws the rejection of claim 8 under this section and covers claim 8 under §103(a) as set forth below.

OBVIOUSNESS UNDER §103(a)

Rejection of Claims 1-10 under 35 USC §103(a) Based On Seo In View of Partyka et al.

Is valid.

Claims 1, 3 and 6 are made obvious by the Seo in view of Partyka et al. combination.

Base claims 1 and 6 were grouped together as 1-10 in the Final Office Action under 103 because claims 2-5 and 7-10 which depend therefrom were addressed therein and the underlying structure of each base claim was considered with the limitations of the dependent claim.

Claim 3 recited dispensing into a reusable storage unit. The cup in Seo is deemed to be a reusable storage unit, being that it would be an obvious use of the cup to reuse it to save money.

Claims 2 and 7 are made obvious by the Seo in view of Partyka et al. combination.

Claims 2 and 7 recite the feature of “ simultaneous multiple customization” . Given the broad interpretation of the term “ multiple customization” , the plural vending machine teaching of Partyka et al. is deemed sufficient to provide this feature because plural ones of machines, such as the type found in Seo, can with the right coordination of users, effect simultaneous ordering resulting in “ simultaneous multiple customization” , e.g., reconstituting of components at the same time. (§103 combinations may teach

inherent functionality between references, See, e.g. In re Schreiber, 44 USPQ2d 1429 (CAFC 1997).

Claims 4,5,8-10 are made obvious by the Seo in view of Partyka et al. combination.

The Examiner admits in Seo, “ there is no teaching of remote controlling” (See Final O.A. p. 3), but the Examiner finds clear basis for this feature in the secondary reference to Partyka et al. in elements 106, 104 which are connected via telephone lines see col. 7 of Partyka et al.

The combination of Seo and Partyka et al. is proper because both references deal with vending machines and generating a common computer host for remote controlling a vending machine is desirable because it would increase throughout and have a common source of control. Col. 5 lines 6 et seq. of Partyka et al. provide a motivating reason for such a combination, namely to “ arrive at a desirable service schedule for servicing the various vending machines. What could be more important to automated machinery than its upkeep? Partyka et al. further refers to a remote operating means as recited in claims 4, 5-8, 9, 10 at col. 5 lines 55-60 stating that each vending machine communicates with “ a remote host unit 106, such communication preferably takes place via modem over telephone lines.” Thus, there is a clear teaching for the remote communications feature in Partyka et al. Again, the motivation for providing a remote communications device to a host unit is the ability to monitor the status of the unit.

Appellants admit that motivation can be found for the proposed combination, but which motivation yields a vending machine only for “ preformulated products with a more accurate service/repair schedule” . (App. Brief p. 13). As such, the Examiner submits that the proposed combination successfully results in a legally created device/method under §103 having a remote control means. That the resulting system is only capable of service/repair control is irrelevant because (1) the claims recite no conflicting specified functions; and (2) all that is legally required to satisfy the motivation requirement is that there only be “ *something* in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination” . In re Gurley, 27 F.3d 31, USPQ 2d 1130 (Fed. Cir. 1994). The allegation that the motivation is not aligned with Appellants’ is simply not the law, especially given that the involved claims make no mention of a functional use other than structure. Thus, the rejection of claims 4,5,8-10 under §103 based on Seo in view of Partyka et al. must be upheld as proper.

Claims 6, 8, 14, 16 17, 18 Are Obvious Under 35 USC §103(a) Based on Seo In View of Whigham.

Claims 8,14,16, 17 and 18 each recite the feature of “ batch processing fore handling orders” . The mixing unit 13 of Seo is read as mixing a batch in a process which is an obvious way of mixing components in a batch. In other words, there is no structural limitation(s) recited which would make batch processing directed to anything

more than this broad reading. Accordingly, the mixing unit 13 in Seo is read as obviously batch processing the ingredients in the coffee. Notwithstanding, Whigham provides a teaching of multiple vending machines connected by remote means (load link 112, col. 1, lines 23-33 discuss plural vending machines working simultaneously). The use of plural vending machines created in the proposed combination is alternatively read as batch processing. Motivation for combining Seo in view of Whigham is provided in the Final Office Action, namely, “ to allow the user to access one of many vending machines.” Whigham describes the use of credit cards as payment in a vending machine system. Access to vending machines by credit card companies is desirable because it would offer Seo another form of payment.

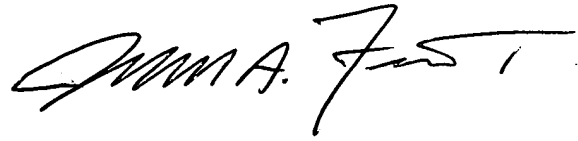
Regarding claims 11, 12,13, these claims recite the feature of plural interfaces capable of being connected to one or more further vending systems. The language in these claims following “ such that” is deemed functional without sufficient structural basis to effect the recited result. Thus it, is the Examiner’ s position that a teaching of plural interfaces in Whigham will make obvious claims 11, 12, 13. Appellants’ arguments addressing claims 11,12 and 13 vastly exceed the scope of these claims. All claims 11,12, 13 call for are a plurality of interfaces connectable to further systems. These features are all disclosed in Whigham in the form of interfaces or links 110 and 112. These are plural interfaces. First, they are greater than two, and hence satisfy the plural requirement. Second, in col. 1, lines 26-28, Whigham recites “ ... vending

machines require an online connection...” . Thus, there is disclosure of interconnectability from one vending machine to another via the internet. Hence, Whigham meets the specified feature of plural interfaces capable of interconnection.

Appellants argue but fail to provide any conflicting aspects between Seo and Whigham which would obviate the motivation provided by the Examiner in the Final Office Action, namely, “ to allow the user to access one of many vending machines.” Whigham describes the use of credit cards as payment in a vending machine system. Access to vending machines by credit card companies is desirable because it would offer Seo another form of payment. Accordingly, the combination of Seo in view of Whigham is deemed proper with respect to claims 11, 12 and 13.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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February 9, 2005

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